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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEVEN XAVIER FERNANDEZ,

Plaintiff,

v.

NANCY A. BERRYHILL,¹
Acting Commissioner of the
Social Security Administration,

Defendant.

No. EDCV 16-0890 SS

MEMORANDUM DECISION AND ORDER

I.
INTRODUCTION

Steven Xavier Fernandez ("Plaintiff") seeks review of the final decision of the Commissioner of the Social Security Administration (the "Commissioner" or the "Agency") denying his application for social security benefits. The parties consented,

¹ Nancy A. Berryhill is now the Acting Commissioner of Social Security and is substituted for former Acting Commissioner Carolyn W. Colvin in this case. See Fed. R. Civ. P. 25(d).

1 pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the
2 undersigned United States Magistrate Judge. For the reasons
3 stated below, the decision of the Commissioner is REVERSED and
4 this case is REMANDED for further administrative proceedings
5 consistent with this decision.

6
7 **II.**

8 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**
9

10 To qualify for disability benefits, a claimant must
11 demonstrate a medically determinable physical or mental
12 impairment that prevents him from engaging in substantial gainful
13 activity and that is expected to result in death or to last for a
14 continuous period of at least twelve months. Reddick v. Chater,
15 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C.
16 § 423(d)(1)(A)). The impairment must render the claimant
17 incapable of performing the work he previously performed and
18 incapable of performing any other substantial gainful employment
19 that exists in the national economy. Tackett v. Apfel, 180 F.3d
20 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).
21

22 To decide if a claimant is entitled to benefits, an ALJ
23 conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920.
24 The steps are:
25

- 26 (1) Is the claimant presently engaged in substantial
27 gainful activity? If so, the claimant is found
28 not disabled. If not, proceed to step two.

1 (2) Is the claimant's impairment severe? If not, the
2 claimant is found not disabled. If so, proceed
3 to step three.

4 (3) Does the claimant's impairment meet or equal one
5 of the specific impairments described in 20
6 C.F.R. Part 404, Subpart P, Appendix 1? If so,
7 the claimant is found disabled. If not, proceed
8 to step four.

9 (4) Is the claimant capable of performing his past
10 work? If so, the claimant is found not disabled.
11 If not, proceed to step five.

12 (5) Is the claimant able to do any other work? If
13 not, the claimant is found disabled. If so, the
14 claimant is found not disabled.

15
16 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,
17 262 F.3d 949, 953-54 (9th Cir. 2001) (citations omitted); 20
18 C.F.R. §§ 404.1520(b)-(g)(1) & 416.920(b)-(g)(1).

19
20 The claimant has the burden of proof at steps one through
21 four, and the Commissioner has the burden of proof at step five.
22 Bustamante, 262 F.3d at 953-54. Additionally, the ALJ has an
23 affirmative duty to assist the claimant in developing the record
24 at every step of the inquiry. Id. at 954. If, at step four, the
25 claimant meets his burden of establishing an inability to perform
26 past work, the Commissioner must show that the claimant can
27 perform some other work that exists in "significant numbers" in
28 the national economy, taking into account the claimant's residual

functional capacity ("RFC"), age, education, and work experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at 721; 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). The Commissioner may do so by the testimony of a vocational expert or by reference to the Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart P, Appendix 2 (commonly known as "the Grids"). Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001). When a claimant has both exertional (strength-related) and non-exertional limitations, the Grids are inapplicable and the ALJ must take the testimony of a vocational expert. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000) (citing Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir. 1988)).

III.

THE ALJ'S DECISION

The ALJ employed the five-step sequential evaluation process in evaluating Plaintiff's case. At step one, the ALJ found that Plaintiff met the insured status requirements of the Act through December 31, 2016, and had not engaged in substantial gainful activity since May 7, 2011, his alleged onset date. (Certified Administrative Record ("AR") 19). At step two, the ALJ found that Plaintiff had the following severe impairments: blindness in the left eye; left knee injury, medial meniscus tear, lateral meniscus tear, thickened synovial plica, status post operation to the left knee; diabetes mellitus; obesity; and tinnitus. (AR 19).

1 At step three, the ALJ found that Plaintiff did not have an
2 impairment or combination of impairments that met or medically
3 equaled one of the listed impairments in 20 C.F.R. Part 404,
4 Subpart P, Appendix 1. (AR 20).

5
6 At step four, the ALJ determined that Plaintiff had the RFC
7 to perform light work, further ruling that Plaintiff is blind in
8 his left eye; his right eye is "normal;" he has no true depth
9 perception; he has limited field of vision on the left eye; he
10 can lift and/or carry 20 pounds occasionally and 10 pounds
11 frequently; he can stand and/or walk one hour at a time; he can
12 sit for "a couple of minutes" after being on his feet for one
13 hour; he can occasionally climb ramps and stairs, balance, stoop,
14 kneel, crouch, and crawl; he cannot climb ladders, ropes, or
15 scaffolds; he cannot drive at night; and he will miss work 1 to 2
16 times per month. (AR 21).

17
18 The ALJ determined that Plaintiff could return to his past
19 relevant work as a newspaper salesperson. (AR 27-28). The ALJ
20 opined that Plaintiff's work as a newspaper salesperson qualified
21 as "past relevant work" within the meaning of Agency regulations
22 in part because he performed it "at the level of substantial
23 gainful activity." (AR 27). Accordingly, the ALJ concluded that
24 Plaintiff was not disabled under the Agency's rules. (AR 28).

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1 IV.

2 STANDARD OF REVIEW

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4 Under 42 U.S.C. § 405(g), a district court may review the
5 Commissioner's decision to deny benefits. The court may set
6 aside the Commissioner's decision when the ALJ's findings are
7 based on legal error or are not supported by "substantial
8 evidence" in the record as a whole. Aukland v. Massanari, 257
9 F.3d 1033, 1035 (9th Cir. 2001) (citing Tackett, 180 F.3d at
10 1097); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996)
11 (citing Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).
12

13 "Substantial evidence is more than a scintilla, but less
14 than a preponderance." Reddick, 157 F.3d at 720 (citing Jamerson
15 v. Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant
16 evidence which a reasonable person might accept as adequate to
17 support a conclusion." Id. (citing Jamerson, 112 F.3d at 1066;
18 Smolen, 80 F.3d at 1279). To determine whether substantial
19 evidence supports a finding, the court must "'consider the record
20 as a whole, weighing both evidence that supports and evidence
21 that detracts from the [Commissioner's] conclusion.'" Aukland,
22 257 F.3d at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th
23 Cir. 1993)). If the evidence can reasonably support either
24 affirming or reversing that conclusion, the court may not
25 substitute its judgment for that of the Commissioner. Reddick,
26 157 F.3d at 720-21 (citing Flaten v. Sec'y, 44 F.3d 1453, 1457
27 (9th Cir. 1995)).
28

1 V.

2 DISCUSSION

3
4 Plaintiff alleges that the ALJ erred in finding at step four
5 that Plaintiff's work as a newspaper salesperson qualified as
6 "substantial gainful activity." (Joint Stipulation at 4-8, 10-
7 11).

8
9 For the reasons discussed below, the Court cannot readily
10 conclude that the ALJ's step four finding was supported by
11 substantial evidence and free of legal error. The Court will
12 accordingly remand this matter for further proceedings.

13
14 The Court Cannot Conclude That The ALJ's Step Four Finding
15 Was Supported By Substantial Evidence And Free Of Legal
16 Error

17
18 A. Legal Standards

19
20 During step four of the five-step process, the ALJ must
21 determine whether a claimant can return to his past relevant work
22 in light of his RFC. Past relevant work is "work that [a
23 claimant has] done within the past 15 years, which was
24 substantial gainful activity, and that lasted long enough for
25 [the claimant] to learn to do it." 20 C.F.R. §§ 404.1560(b)(1)
26 and 416.960(b)(1). Substantial gainful activity is defined as
27 "work activity that involves doing significant physical or mental
28 activities . . . that [a claimant does] for pay or profit." 20

1 C.F.R. §§ 404.1572 and 416.972. A presumption that a person
2 engaged in substantial gainful activity is made if that person's
3 average monthly income attributable to that activity exceeds a
4 certain amount. 20 C.F.R. §§ 404.1574 and 416.974; Keyes v.
5 Sullivan, 894 F.2d 1053, 1056 (9th Cir. 1990). However, earnings
6 alone are not dispositive and other factors may rebut the
7 presumption, such as "the time spent working, quality of a
8 [claimant's] performance, special working conditions, and the
9 possibility of self-employment." Katz v. Sec'y, 972 F.2d 290,
10 293 (9th Cir. 1992).

11
12 The Agency calculates monthly earnings by "averag[ing]
13 earnings over the entire period of work." 20 C.F.R.
14 §§ 404.1574a(a) and 416.974a(a); see also Anderson v. Heckler,
15 726 F.2d 455, 457 (8th Cir. 1984) (monthly earnings are
16 calculated by averaging earnings over months actually worked
17 instead of averaging earnings over the entire year). If a
18 claimant's earnings level or work pattern significantly changes
19 during the period of work, the Agency will average earnings
20 during each period of work separately. 20 C.F.R.
21 §§ 404.1574a(b)&(c) and 416.974a(b)&(c).

22 23 **B. Analysis**

24
25 At step four, the ALJ determined that Plaintiff could return
26 to his past relevant work as a newspaper salesperson, which
27 qualified as "past relevant work" in part because he performed it
28 "at the level of substantial gainful activity." (AR 27).

1 The record is ambiguous and contradictory regarding whether
2 Plaintiff's work as a newspaper salesperson qualifies as
3 substantial gainful activity. In an April 2013 Work History
4 Report, Plaintiff reported that he had worked as a newspaper
5 salesperson between May 2002 and May 2005. (AR 261). He claimed
6 that he was paid \$300 per week and worked four hours per day,
7 five days per week. (AR 264). Plaintiff's Disability Report
8 contained the same information. (AR 242). A person is presumed
9 to engage in substantial gainful activity if his average monthly
10 income from that activity exceeded \$780 in 2002 (\$195 weekly,
11 \$9,360 annually); \$800 in 2003 (\$200 weekly, \$9,600 annually);
12 \$810 in 2004 (\$202.50 weekly, \$9,720 annually); or \$830 in 2005
13 (\$207.50 weekly, \$9,960 annually).² 20 C.F.R. §§ 404.1574 and
14 416.974; see also Monthly Substantial Gainful Activity Amounts
15 Chart, available at <http://www.ssa.gov/OACT/COLA/sga.html>.
16 Plaintiff's allegations that he was paid \$300 per week therefore
17 suggest that his work selling newspapers was presumptively
18 "substantial gainful activity." Keyes, 894 F.2d at 1056.

19
20 However, during the hearing before the ALJ, Plaintiff could
21 not recall how much he made every year selling newspapers, but he
22 claimed that his earnings were reported to the Internal Revenue
23
24

25 ² Weekly figures are obtained by dividing the monthly figure by
26 four. Annual figures are obtained by multiplying the monthly
27 figure by twelve. Because Plaintiff alleges that he sold
28 newspapers continuously on a fairly consistent weekly schedule
between 2002 and 2005, (AR 59, 61, 242, 264), the Court applies
these weekly, monthly, and annual rates interchangeably as
necessary.

1 Service via a Form 1099.³ (See AR 59, 61). Plaintiff's DISCO DIB
2 Insured Status Report indicates that Plaintiff's earnings were
3 \$7,799 in 2002, \$5,910.05 in 2003, \$3,661.80 in 2004, and
4 \$14,944.87 in 2005. (AR 236; see also AR 224 (summary FICA
5 Earnings Report showing identical earnings amounts)). In 2005,
6 \$1,284 of Plaintiff's reported earnings came from self-
7 employment; \$2,825 came from an employer with Employer
8 Identification Number ("EIN") 223758167; \$3,181 came from an
9 employer with EIN 363952952; and \$7654.87 came from an employer
10 with EIN 593612675. (AR 227).

11
12 Based upon this evidence, in 2002, 2003, and 2004
13 Plaintiff's total reported earnings from all work were below the
14 level of "substantial gainful activity" in each year (\$9,360,
15 \$9,600, and \$9,720, respectively). Although Plaintiff's total
16 earnings of \$14,944.87 in 2005 exceeded the "substantial gainful
17 activity" level of \$9,960, no individual employer's contribution
18 to Plaintiff's earnings exceeded this level. Moreover, the
19 employer that paid Plaintiff the most during 2005, the employer
20 with EIN 593612675, does not appear on Plaintiff's FICA earnings
21 report in previous years but appeared again in 2006, suggesting
22 that this was not the employer for which Plaintiff sold
23 newspapers between 2002 and 2005. (AR 225-27; see also AR 261
24 (Work History Report stating that Plaintiff began working as a

25
26 ³ "An IRS Form 1099 is used to report various types of income –
27 other than wages, salaries, and tips – to the IRS. Such income
28 includes, inter alia, dividends and distributions, interest,
government payments, payments to independent contractors, and
miscellaneous income." United States v. Srivastava, 540 F.3d
277, 284 n.10 (4th Cir. 2008).

1 collections agent for a cable company in 2005 and worked there
2 until 2006)). This evidence suggests that Plaintiff's work as a
3 newspaper salesperson was not performed at the level of
4 substantial gainful activity. Keyes, 894 F.2d at 1056.

5
6 The ALJ's opinion states that Plaintiff sold newspapers "for
7 3 to 4 years . . . [for] 20 to 30 hours a week," (AR 27), but it
8 does not discuss why the ALJ concludes that this work was
9 performed at the level of substantial gainful activity. During
10 the hearing, the ALJ questioned Plaintiff about his job as a
11 newspaper salesperson, but the ALJ did not make a finding on
12 whether this employment was performed at the level of substantial
13 gainful activity. (AR 35-71). Although the Court cannot
14 substitute its judgment for that of the Commissioner if the
15 evidence could support either affirming or reversing the
16 Commissioner, Reddick, 157 F.3d at 720-21, the ALJ's failure to
17 discuss why he discounted earnings evidence reported from outside
18 government agencies in favor of Plaintiff's self-reports prevents
19 this Court from effectively reviewing whether the ALJ's decision
20 to do so was supported by substantial evidence and free of legal
21 error. Aukland, 257 F.3d at 1035. To the extent that the record
22 was ambiguous regarding Plaintiff's past relevant work, the ALJ
23 also had the duty to develop the record further regarding this
24 issue if possible. Tonapetyan v. Halter, 242 F.3d 1144, 1150
25 (9th Cir. 2001) (ambiguous evidence relevant to a finding of
26 disability triggers the ALJ's duty to develop the record); cf.
27 Dugan v. Sullivan, 957 F.2d 1384, 1390-91 (7th Cir. 1992) (even
28 where income guidelines are indisputably met, they "create only a

1 presumption, and they do not relieve an ALJ of the duty to
2 develop the record fully and fairly").

3
4 The Court also observes that the vocational expert testified
5 that he could not conclude whether "some of" Plaintiff's past
6 jobs were performed at the level of substantial gainful activity
7 and opined that newspaper salesperson was the only past relevant
8 work that Plaintiff might return to given his limitations. (AR
9 63-64). The ALJ also did not make any alternative findings at
10 step four or five. (AR 27-28). Therefore, the Court cannot
11 conclude that the ALJ's error is harmless. See Carmickle v.
12 Comm'r, 533 F.3d 1155, 1162 (9th Cir. 2008) (because the ALJ's
13 error was inconsequential to the ultimate non-disability
14 determination, no remand was required).

15
16 For the foregoing reasons, the matter is remanded for
17 further proceedings. On remand, the ALJ should re-evaluate
18 whether Plaintiff's past work as a newspaper salesperson was
19 performed at the level of substantial gainful activity and, if
20 necessary, proceed through the remainder of the five-step
21 process.

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1 VI.

2 CONCLUSION

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4 Accordingly, IT IS ORDERED that Judgment be entered
5 REVERSING the decision of the Commissioner and REMANDING this
6 matter for further proceedings consistent with this decision. IT
7 IS FURTHER ORDERED that the Clerk of the Court serve copies of
8 this Order and the Judgment on counsel for both parties.

9
10 DATED: June 12, 2017
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12

13 _____/S/
14 SUZANNE H. SEGAL
15 UNITED STATES MAGISTRATE JUDGE
16

17 THIS DECISION IS NOT INTENDED FOR PUBLICATION IN LEXIS/NEXIS,
18 WESTLAW OR ANY OTHER LEGAL DATABASE.
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